The second question to be answered now is whether the employees were working at the demise premises when the auction took place. On this, I find that the learned Magistrate has failed to consider the absence of any evidence that these 5 employees were working at the demise premises at the material time. There is no denial to the appellants' allegation that the respondents never employed any employees to work at the demise premises which was a ware house. When there is no such denial then such contention can be considered as the truth. This being the case, the employees have failed to qualify for priority payment under the proviso of s. 31 of the Employment Act 1955. They are therefore not entitled to the proceeds of sale in priority to the appellants.

I therefore allow this appeal with cost and order that sufficient amount of the proceeds of sale in the Klang Magistrate Court be released to the appellants to satisfy the writ of distress.

YEOH TIONG LAY & SONS HOLDINGS SDN. BHD.

v.

ANNAVI S/O MOOKAN & ANOR. AND DEKOR PANEL EMAS SDN. BHD. (INTERVENER)

HIGH COURT, SHAH ALAM
DATO' MAHADEV SHANKAR J.
[CIVIL SUIT NO. 22-324-90]
20 AUGUST 1993

CONTRACT: Land offered for sale to plaintiff by 1st defendant on behalf of beneficiaries of land - Offer confirmed by letter - Sale subject to consent of 2nd defendant - 2nd defendant under receivership - Receivers not consenting - Plaintiff informed sale aborted - Plaintiff claimed letter binding contract - Plaintiff filed caveat on land - Plaintiff filed civil suit against defendants for specific performance and ancillary reliefs - Whether plaintiff had enforceable contract for purchase of land.

TRUST: Land held on irrevocable trust by 2nd defendant on behalf of beneficiaries - 2nd defendant registered proprietor of land - Whether beneficiaries had capacity to make an enforceable contract of sale.

PRACTICE & PROCEDURE: Order 15 r. 12(1) & (2) RHC - Application by plaintiff to appoint 1st defendant as representative of all beneficiaries - Whether 1st defendant authorised by all beneficiaries - Application by plaintiff to reamend amended statement of claim - Whether reamendment was of substance.

PRACTICE & PROCEDURE: Order 18 r. 19 RHC - Application by 1st defendant to strike out plaintiff's action dismissed by SAR - Appeal by 1st defendant - Whether appeal had merit - Application by 2nd defendant to strike out plaintiff's action allowed by SAR - Appeal by plaintiff - Whether SAR correct - Whether appeal had merit.

PRACTICE & PROCEDURE: Receivers entered into sale and purchase agreement of land with interveners - Interveners unable to register transfer because of plaintiff's caveat - Extension of caveat granted by the Court - Application by intervener to remove caveat.

LAND LAW: Whether filing of caveat by plaintiff calculated to frustrate sale of land to intervener - Whether actions of plaintiff malicious - Whether there were any grounds for exemplary or punitive damages.

In 1985, 37 members of a co-operative society called Syarikat Kerjasama Nesa Pelbagai Berhad (Nesa) obtained loans from Nesa to purchase a piece of land. Upon payment of the purchase price by Nesa to the vendor the land was transferred into the name of Nesa as trustee for the 37 beneficiaries (the beneficiaries). An irrevocable Trust Deed was duly executed between Nesa and the beneficiaries. Subsequently, Nesa got into difficulties and receivers were appointed.

In January 1990 the land was offered for sale to the plaintiff by the 1st defendant purportedly on behalf of the beneficiaries. Solicitors wrote a confirmatory letter dated 24 January 1990 for the parties which *inter alia* stated, "Upon Nesa Co-operative releasing or agreeing to release the title, a formal Sale and Purchase Agreement will be executed ...". Consent to sell was refused by the receivers of Nesa. The sale was aborted and the plaintiff's deposit returned. The plaintiff refused to accept this contending that the letter constituted a binding contract on which basis he filed a caveat. On 25 June 1990, the receivers entered into a formal agreement for the sale of the land to the intervener. The intervener could not register the transfer due to the caveat.

The plaintiff eventually filed a civil suit for specific performance and other ancillary reliefs against the 1st defendant and later obtained an order of Court to amend the writ and statement of claim to add Nesa as the 2nd defendant. The intervener applied by way of originating summons to remove the caveat. Both matters being inextricably linked were consolidated. Several applications and cross applications were also made in both the suit and the originating summons.

Held:

[1] The land was held under an irrevocable trust by Nesa, the registered proprietors. It is trite law that only the legal owner or registered proprietor has the power to sell.Even if all beneficiaries entered into such a contract it would be void for the mere reason that the beneficiaries had no **vested legal right** to the said land. They had no capacity to contract any valid sale. Only the trustees being the legal owners could contract.

[2] The plaintiff and their legal advisors were aware of the letter of 24 January 1990. Even if there was no trust in existence there was no avoiding a second insurmountable obstacle which was a condition precedent contained in the letter. It was an undisputed fact that Nesa did not know of this alleged agreement and when known it was not agreed to. It was the plaintiff who refused to accept this.

[3] The third and perhaps most potent obstacle was that Nesa had passed into statutory receivership. It was the emphatic opinion of the Court that the plaintiff's purported contract with the beneficiaries was null and void and of no legal effect whatsoever. To interfere with the statutory duties of the receivers could well attract penal sanctions but for the present the Court could not permit the position of the receivers from being subverted.

[4] It was strange that the application to appoint the 1st defendant as representative of all the beneficiaries was not made at the commencement of the action but only long afterwards. Such application must be made under O. 15 r. 12(1) & (2) Rules of the High Court 1980 (RHC). The critical words in the rules were "numerous persons". As the beneficiaries were named in the statement of claim the Court could not see why all of them could not be named as defendants in the action. To unilaterally invest the 1st defendant as representative of all beneficiaries as the plaintiff did at the outset seemed presumptious. From the affidavits before the Court it was obvious that none of the other beneficiaries consented to the representation order. The Court accordingly dismissed this application with costs.

[5] The 1st defendant's application to strike out the claim against him in his personal or alleged representative capacity was made under O. 18 r. 19 of the RHC on all the grounds thereunder. The Court found the 1st defendant was entitled to succeed on a mere technicality i.e. that he had been sued in a representative capacity which did not exist and on the merits for reasons already set out. Accordingly, the SAR's decision was set aside and the 1st defendant's appeal allowed both here and in the Court below.

[6] Was the SAR correct in striking out the plaintiff's action against Nesa? In the Court below the plaintiff obtained an order to amend both their writ and statement of claim to include Nesa as a second defendant but their solicitors failed to file the amended pleadings within 14

days and the order lapsed. There was also the failure to obtain leave of the Court to institute these proceedings against the receivers which point was taken at the outset and it was too late for the plaintiff to apply for leave now. Apart from the technicalities the appeal was devoid of merit and the Court held the action was properly struck out.

[7] In view of the striking out of the plaintiff's claim against Nesa, the plaintiff's application to reamend their writ and statement of claim which was directed against Nesa was also dismissed.

[8] With respect to the intervener's application for removal of the caveat, the plaintiff was aware when they sought the extension that the receivers had sold the land to the interveners. Their actions from the time of the filing of the caveat to this date was calculated to frustrate that sale. The Court accordingly allowed the intervener's application with costs but added that there could be grounds for exemplary or punitive damages if suggestions that the plaintiff's actions were motivated by malice were true. That issue would be left to be decided when the damages were assessed which the Court directed be heard by a Judge.

Obiter:

This caveat and this action in all the circumstances was an abuse of process. A view is becoming prevalent that caveats can be lodged with impunity however fanciful the grounds in support of them may be and that in order to sustain them till the end of a civil action, it is enough for the plaintiff to raise some serious question to be tried. The Court would reiterate that the differences between caveats and injunctions must be emphasised rather than glossed over. It is a very serious matter to freeze a person's land for years and years. Consequently all concerned should direct their attention in appropriate cases to compel persons who lodge caveats to consider whether they should be made to give an undertaking as to damages, fortified with a collateral if need be, where the caveat is being extended till final disposal of a suit.

Secondly, it is not enough to rely upon a conflict of evidence in affidavits in order to sustain a caveat until final determination of the suit. (See *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212 per Lord Diplock, at p. 217). In the affidavits filed there was a preponderance of evidence that the 1st defendant was not acting on behalf of all the beneficiaries, and had no authority from them to do so. He has denied he was acting. The solicitor said he was acting for the beneficiaries but did not say he was acting for all of them and denied he had any such authority. The letter he wrote clearly stated it was a conditional promise to sell. The plaintiff's contention of an enforceable contract was not based on any hard evidence whatsoever.

[The plaintiff's application to appoint the 1st defendant as representative of all beneficiaries and to reamend the writ and statement of claim was dismissed with costs. The 1st defendant's appeal against the SAR's decision was allowed. The action against the 1st defendant was dismissed with costs for the appeal and the suit. The plaintiff's appeal against the SAR's decision striking out the claim against Nesa was dismissed with costs here and in the Court below. The intervener's application for removal of the caveat was allowed with costs].

Cases referred to:
L.P. Arthur (Insurance) Ltd. v. v. Sisson [1966] 2 All ER 1003 ***(foll)***
Saunders v. Vautier [1841] 4 Beav. 115 ***(refd)***
Anson v. Potter [1879] 13 Ch D 141 ***(cit)***
Sandeman v. Hayne [1937] 1 All ER 368 ***(refd)***
Stephenson v. Barclays Bank Trust Co. Ltd. [1975] 1 WLR 88 ***(refd)***
Hardie & Lane Ltd v. Chiltern & Ors. [1928] KBD 663 ***(cit)***
Morgan's Brewery Co. v. Crosskill [1902] CD 898 ***(cit)***
London Association for Protection of Trade and Anor. v. Greenlands Ltd. [1916] 2 AC 15 ***(cit)***
Walker v. Sur & Ors. [1893] QBD 435 ***(cit)***
Yeo Gek Lang v. Alice Wee [1979] 1 MLJ 213 ***(cit)***
Esso Standard Malaya Bhd. v. Southern Cross Airways (Malaysia) Bhd. [1972] 1 MLJ 168 ***(cit)***
Diamond Peak Sdn. Bhd. & Anor. v. DR Tweedie [1982] 1 MLJ 97 ***(cit)***
Perry v. Suffields, Limited [1916] 2 Ch. 187 ***(cit)***
Eng Mee Yong & Ors. v. V. Letchumanan [1979] 2 MLJ 212 ***(refd)***

Legislation referred to:
Emergency (Essential Powers) Act 1979
Essential (Protection of Depositors) Regulations 1986, Regulation 9(1)(c)
Rules of the High Court 1980, O. 18 r. 19, O. 15 r. 12(1), (2)
Trustees Act 1949

Other sources referred to:
Annual Practice 1991, paragraph 15/12/11, p. 224
Company Law, Walter Woon, p. 368
Receivers, Kerr, 16th Edn., p. 140

For the plaintiff - H.S. Yapp; M/s. Tan & Associates
For the 1st defendant and intervener - M. Pathmanathan; M/s. Yusuf Lee Pathma & Marbeck
For the 2nd defendant - Lai; M/s. T.H. Su & Co.

JUDGMENT

Mahadev Shankar J:

Yeoh Tiong Lay & Sons Holdings Sdn Bhd (YTL) the plaintiffs in this civil suit (this suit) claims to have an enforceable contract for the purchase of the land comprised in EMR 7285 for Lot 1723 in the Mukim of Kapar (the said land). This suit was filed to obtain specific performance and other ancillary reliefs. To protect their alleged right to enforce the sale of the said land to them, YTL filed a caveat (YTL's caveat). Dekor Panel Emas Sdn Bhd (Dekor) claims to have lawfully bought the said land from its rightful owners. Dekor wants the said caveat removed. So they filed this Originating Summons 24-511-92 (this OS) against YTL. That in the main, is what this consolidated action is all about. But there have been several applications and cross-applications made in both this suit and this OS which have obfuceated the real problem this Court must deal with. So its best to start at the beginning.

The said land was bought in 1985 by 37 persons who were members of a Co-operative Society called Syarikat Kerjasama Nesa Pelbagai Berhad (Nesa). The purchase price was paid by Nesa to the vendor, and the said land was then transferred by the vendor directly into the name of Nesa as trustee for the 37 persons aforesaid (hereafter referred to as the 37 beneficiaries). Nesa then appeared on the title as the registered proprietor of the said land albeit as trustee.

As between Nesa and the 37 beneficiaries a Trust Deed was executed on 23 April 1985 whereby Nesa declared that it held the property in trust for the 37 beneficiaries and agreed to transfer the said land at such time and in such manner as the 37 beneficiaries shall direct. But the trust created was declared to be irrevocable.

As will shortly become apparent Nesa was more than just a bare trustee of the said land. The 37 beneficiaries had obtained loans from Nesa which were used to finance the purchase of the land. Nesa was a deposit taking Co-operative and when it got into difficulties Bank Negara stepped in under the powers conferred by the Emergency (Essential Powers) Act 1979 and Regulation 9(1)(c) of the Essential (Protection of Depositors) Regulations 1986. A consent order (the said Order) was made on the 28 June 1989 by Y.A. Mohd Eusoff bin Chin in K.L. High Court OM No. R8-25-67-89 whereby two named Receivers (the receivers) were appointed to manage the affairs and property of Nesa. The said Order contains 19 comprehensive clauses which totally divested the entire powers of the Nesa Board, and placed them in the hands of the receivers. It is not necessary here to repeat those clauses *in extenso*. Suffice it to say that by Clause (i) the receivers were to take control of all assets in the name of Nesa however constituted or wheresoever situated. By Clause (ii) the receivers were to sell the same, and by Clause (xix) the receivers were to do all things incidental thereto. Thus the statutory power of sale of the said land passed into the hands of the receivers as did the issue document of title to the said land.

YTL claimed that sometime in January 1990 one Annavi s/o Mookan held himself out as having the necessary authority to act on behalf of all the 37 beneficiaries and offered to sell the said land for RM130,000 per acre. The parties then went to Nadarajah & Partners a firm of solicitors (the said solicitors) who wrote a confirmatory letter dated 24 January 1990 (the said letter). This letter is relied upon by YTL as constituting an enforceable agreement of sale. It is therefore reproduced here in full:

> M/s. Yeoh Tiong Lay & Sons
> Holdings (M) Sdn. Bhd.
> 11th Floor, YTL Plaza
> 55, Jalan Bukit Bintang
> Kuala Lumpur.
>
> Dear Sirs,
>
> Property held under EMR 7285,
> Lot 1728 Mukim Kapar, Daerah
> Klang
>
> We act for the beneficieries of the above property which is now being held by NESA Cooperatives on Trust.
>
> We have written to NESA Cooperatives seeking the release of this title upon settlement of monies due to them. We believe that there is a sum of about RM53,000 due and owing to the said NESA Cooperatives.
>
> We hereby acknowledge receipt of your cheque BBMB No. 356989 for a sum of RM55,000 as deposit and part payment towards the purchase of the above property which money shall be used to pay the loan due to the said NESA Cooperatives.

Upon NESA Cooperatives releasing or agreeing to release the title, a formal sale and purchase agreement will be executed for the sale and purchase of the property at the agreed price of RM130,000 per acre.

We hereby undertake to refund this sum of RM55,000 to you if the said property could not be transferred into your name for any reason whatsoever.

Yours faithfully,

Sgd.
Nadarajah & Partners.

As is evident from its terms, the beneficiaries owed money to Nesa, and Nesa's consent was a condition precedent for the sale. The material words in the letter are, "Upon Nesa Co-operative releasing or agreeing to release the title, a formal sale & purchase agreement will be executed ...". Everything else being equal it was Nesa who alone had the power to sell the said land and Nesa would have had to execute the sale & purchase agreement. What the said solicitors and the YTL appeared to have overlooked was that Nesa had already passed into receivership. And Nesa never was a party to these negotiations.

By 22 May 1990 the said solicitors discovered that they did not have the consent of all the beneficiaries to the sale. Furthermore when the said solicitors wrote to Nesa by letter dated 12 April l990 for consent to the proposed sale, they received a reply dated 25 April l990 from which it was obvious that such consent would not be forthcoming. This letter showed that the receivers had been appointed on 28 June 1989 and it was signed on behalf of the Nesa by the receiver. (See BD 27).

The said solicitors then wrote to YTL on 22 May 1990 that it was not possible for the sale and purchase agreement to be concluded and returned the RM55,000 which YTL had deposited with them. YTL refused to accept this. They contended that the said letter constituted a binding contract, and on this basis filed the said caveat. There is no material before me to suggest that YTL or its solicitors promptly notified the said solicitors that this caveat had been filed.

On 25 June 1990 pursuant to the powers vested in them by the said order, the receivers entered into a formal sale and purchase agreement for the sale of the said land to Dekor. The full consideration was paid, and a formal memorandum of transfer was executed and handed over to Dekor's solicitors together with the issue docuemnt of title. But when Dekor presented the transfer for registration it found itself blocked by YTL's caveat.

YTL did not act timeously to protect their alleged rights. Five months later in October 1990 they filed this Civil Suit. But YTL although well represented by legal advisors did not name Nesa as the defendant even though YTL knew at all material times, that Nesa was the registered proprietor of the land, and also knew or or ought to have known that Nesa had gone into receivership. Instead YTL chose to name only one person i.e. Annavi S/o Mookan as the defendant allegedly as the representative of all the beneficiaries of the said land. This procedure adopted by YTL's solicitors, to say the least, is curious because YTL was then aware of the individual names of all 37 beneficiaries which are indeed set out in the statement of claim.

Dekor had filed SP24-1218-90 in the K.L. High Court on 20 October 1991. YTL was named as the defendants. The application was to remove YTL's caveat. So at least from then onwards (if not earlier) YTL also knew that Dekor was joining issue with them on the legality of this caveat.

YTL's modus operandi then became curiouser. On 19 February 1991 they filed SP25-5-91 in the High Court at Shah Alam again naming Annavi a/l Mookan alone as the defendant allegedly as the representative of the 37 beneficiaries. This originating summons was for the extension of the said caveat until the disposal of this civil suit.

It is trite law that when a Company has gone into receivership by order of Court no proceedings may be commenced against it unless leave of the Court is first obtained. (See *L.P. Arthur (Insurance) Ltd v. Sisson* [1966] 2 All ER 1003. Also **Company Law** by Walter Woon p. 368 and Kerr on **Receivers,** 16th Edn., p.140. What then followed became even more curious

Pursuant to an application in this suit made by YTL on 24 April 1991, YTL obained an order of this Court on 16 July 1991 to amend this writ and statement of claim by adding Nesa as a second defendant to this action. The order discloses that YTL made this application ex parte. Then on 1 October 1991 YTL made another

application for this "amended' writ to be extended for a further twelve months from 11 October 1991. The afidavit-in-support of this application dated 1 October 1991 avers that they were unable to serve the original writ by reason of their application to amend to include Nesa, an order they had obtained three months earlier. By then Nesa had been served and in fact entered appearance on 10 October 1991,and filed their defence on 28 October 1991 claiming that this action against them was improper since leave of the Court had not been obtained, and misconceived because on the facts YTL had no cause of action. Simultaneously Nesa applied by way of summons-in-chambers under O. 18 r. 19 for the claim to be struck out. (Enclosure 13).

Knowing all this YTL proceeded with the SP25-5-91 for the extension of the caveat. In a manner I do not pretend to understand, on 24 October 1991 YTL's solicitors were able to persuade Y.A. Wan Yahya to make an order ("extension order") that the said caveat do remain unti1 this Civil Suit 22-324-90 is disposed off. It will be recollected that SP25-5-91 was filed by YTL's solicitors against Annavi s/o Mookan. The defendant named in the extension order however is not Annavi s/o Mookan but Syarikat Kerjasama Nesa Pelbagai Bhd. This was achieved by YTL's solicitors applying for on 1 March 1991 and obtaining *ex parte* on 5 March 1991 an order substituting the name of Syarikat Kerjasama Nesa Pelbagai Bhd as defendants. Whilst the fact of receivership was disclosed by YTL's solicitors in the supporting affidavit, they did not apply for, nor obtain the leave of the Court to do this. It seems to have been assumed that this was unnecessary. The receivers came in subsequently to challenge the making of the extension order but Y.A. Wan Yahya preferred to let the merits be sorted out in this civil suit and made the extension order.

It is against such a backdrop that Dekor's application to remove the caveat came up for hearing before Y.A. Anuar in K.L. on 4 December 1991. Dekor was not a party to the extension order already made in Shah Alam on 24 October 1991 which gave life to the said caveat till the merits of YTL's claims against the 37 beneficiaries and Nesa was heard. In the face of this Anuar J. would have had no choice, and if I may so say with respect, quite correctly dismissed Dekor's application without going into the merits.

Dekor had still not been made a party to any of the pending matters in Shah Alam even though they were the ones with the most substantial interest in this matter having already paid for the said land in full. They now took the only course of action open to them. On 9 January 1992 they applied to intervene (Enc. 15). On 16 January 1992 the Court made the necessary order (Enc. 25). All the interested parties were now before the Court at Shah Alam.

I will now set out the issues which the parties have invited me to deal with.

(1) On 30 January 1992 YTL made a formal application to the Judge (Enc. 19) for Annavi a/l Mookan to be appointed representative of all the 37 beneficiaries in this action.

(2) On the same day YTL filed an application to the Senior Assistant Registrar (Enc. 21) to reamend the amended statement of claim further. This reamendment does not appear to be one of substance since it was confined to re-paraphrasing the second prayer for specific performance to compel Nesa to execute a transfer of the said land within thirty days of receiving payment.

(3) On 23 July 1992 the SAR allowed Nesa's application (Enc. 13) and struck out YTL's action against them. YTL has appealed against this dismissal which, so far as Nesa is concerned has disposed of this civil suit against them (Enc. 35).

(4) On 21 May 1992 Annavi s/o Mookan had filed an application (Enc. 29) to strike out YTL's action against him. On 30 July 1992 the SAR had dismissed this application. So this civil suit is to continue against him. Annavi has filed an appeal against this dismissal (Enc. 36).

(5) After the dismissal of YTL's action against Nesa, Dekor filed SP24-511-92 against YTL (Enc. 1) for the removal of the said caveat, on the ground that the extension order had thus ceased to have any further effect.

Since SP24-511-92 is inextricably involved with this civil suit both matters were consolidated. Owing to the complexity of the questions of law involved the parties have filed written submissions which I have had a full opportunity of considering. I proceed now to give my reasons for the decisions I am about to make.

It would be preferable if we addressed our minds to the main question first. Has YTL an

enforceable contract for the purchase of the said land assuming that all the facts they have pleaded and averred in the various affidavits filed in support of their claim are deemed to be proved?

It is common ground that Nesa was the registered proprietor of this land. The trust, so called was not a bare trust but if I may so put it, it was a trust for a consideration. Nesa had lent moneys to the beneficiaries. The trust was for that reason expressly stated to be irrevocable (some further ramifications of what all this involves is contained in an Exhibit in an affidavit of Kathleen Chen Wai Lin (the YTL's Legal Advisor): Enc. 34 in this civil suit. (See Ex. A thereto and the sub-Exhibit B to the affidavit filed thereunder. It is an agreement dated 10 May 1978 between Nesa and Annavi which shows that Nesa was literally in the position of a chargee of the said land with powers to sell the same). I will ignore all this for the time being, and proceed on the basis that this was a bare trust. Here was the said land. It was held under an irrevocable trust. The trustees were the registered proprietors. Nesa was the legal owner of the said land.

In these circumstances who had the power to sell the said land? It is trite law that only the legal owner or the registered proprietor has the power to sell - not one or more beneficiaries under the trust, anymore than a shareholder in a company or one of the next of kin in a deceased estate can enter into a valid contract to sell the assets of the company or the estate of the deceased. Even if all such beneficiaries entered into such a contract that contract would be void for the mere reason that the beneficiaries have no **vested legal** right to the said land. They have no capacity to contract any valid sale. Only the trustees being the legal owners can contract.

Under the rule in *Saunders v. Vautier* [1841] 4 Beav 115 if all the beneficiaries are *sui juris* and together entitled to the whole of the beneficial interest they can, everything else being equal, put an end to the trust and direct the trustees to hand over the trust property as they direct. (See *Anson v. Potter* [1879] 13 Ch D 141). Under the law of trusts and our Trustees Act 1949 as now constituted, it is the opinion of this Court that such a trust can only be put to an end, by a proper order of the High Court; which would be imperative if the trustees object. It is only after the trust has been terminated and the property transferred to the beneficiaries, that the legal and beneficial interests in the said land, would vest in the beneficiaries so as to give them a capacity to make an enforceable contract of sale. The application of these principles is exemplified in *Re Sandeman's Will Trusts, Sandeman v. Hayne* [1937] 1 All ER 368 and *Stephenson v. Barclays Bank Trust Co. Ltd.* [1975] 1 WLR 88.

From the word go, YTL and their legal advisors were aware of the said letter of the said solicitors dated 24 January 1990. Even if Nesa had not passed into receivership it is crystal clear that even if there was an unconditional promise by all the beneficiaries to sell such a promise could not form the basis of a contract which was legally enforceable

Even if there was no trust in existence there is no getting away from a second insurmountable obstacle. The said letter contained a condition precedent. Unless Nesa agreed to release the title and enter into a sale & purchase agreement, there was to be no sale. It is an undisputed fact that Nesa did not know of this alleged agreement and when it got to be known they did not agree. This was made known to YTL who refused to accept it.

The third insurmountable obstacle and perhaps the most potent is the fact that Nesa had passed into statutory receivership. This Court must take cognisance that Parliament passed this legislation to protect innocent depositors from financial disaster caused by mismanagement (wilful or negligent) or even a lack of professionalism in dealing with a catastrophic downturn in economic forces. Even assuming (in the face of overwhelming evidence in this case to the contrary) that all the beneficiaries had purported to contract to sell the said land to YTL, it is the emphatic opinion of this Court that such an act and the act of YTL in purporting to contract with them was null and void and of no legal effect whatsoever. To interfere with the statutory duties of the receivers may well attract other penal sanctions under the Emergency (Essential Powers) Act 1979 and the Essential (Protection of Depositors) Regulations 1986. That aspect must be left to be considered elsewhere. For the present this Court cannot permit the position of the receivers from being subverted in this way.

Enclosure 35

Was the SAR correct in striking out YTL's action against Nesa. In the Court below there

were other reasons for doing this. YTL obtained an order to amend both their writ and the statement of claim to include Nesa as a second defendant. YTL's solicitors failed to file the amended pleadings within fourteen days. The order therefore lapsed. Consequently there was nothing else the SAR could do but to strike out. There was also the failure to obtain leave of the Court to institute these proceedings against the receivers. The point was taken at the outset. It is too late for YTL to apply for leave now. I hold that the action was properly struck out and dismiss YTL's appeal Enc. 35. Apart from the technicalities the appeal is devoid of merit.

Enclosure 1 in OS 24-5111-92

This was Dekor's application to have YTL's caveat cancelled. It will be recollected that the extension order was originally sought against Annavi in his alleged representative capacity but subsequently Nesa was substituted. YTL was aware when they sought for the extension that the receivers had sold the land to Dekor. Their actions from the time of the filing of the caveat to this date was calculated to frustrate this sale.

In view of the foregoing I make an order in terms of Enc. 1 aforesaid with costs. But I wish to add that normally damages are only compensatory. Dekor were equitable owners of this land from the time of completion of their contract. In the affidavits filed, it has been suggested that YTL's acts were motivated by malice. If so, there may well be grounds for granting exemplary or punitive damages against YTL. That issue must be left to be decided when the damages are assessed. I direct that it be heard by a Judge.

Enclosure 21

In view of the striking out of YTL's claim against Nesa, it is not necessary to say more about this except that it should follow the event. The amendment was directed against Nesa. It is dismissed with costs.

Enclosure 19

It is strange that this application for a Court order to appoint Annavi s/o Mookan as the representative of all 37 beneficiaries was being made not when the action was commenced on 11 October 1990 but long afterwards on 30 January 1992.

Such application must be made either under O. 15 r. 12(1) or (2). The leading case is *Hardie & Lane Ltd v. Chiltern & Ors.* [1928] KBD 663. The critical words in these rules are "numerous persons". Every one of the 37 beneficiaries was named in the statement of claim and I cannot see why all of them could not be named as defendants in the action. Unilaterally to invest Annavi as a person designated to represent all 37 beneficiaries, as YTL did at the outset, seems presumptious. I agree with Counsel for Annavi that the law is correctly stated in the **Annual Practice 1991** paragraph 15/12/11 p. 224 which reads:

> Before authorising a person to represent himself and others as defendants, the Court must be satisfied that he is authorisled to defend them.
>
> and
>
> The Court does not leave the ultimate selection of representative defendants to be at the mere will or choice of the plaintiff or defendants and will only make a representation order as against proper persons to defend on behalf of others.

(See cases of):

1. *Morgan's Brewery Co. v. Crosskill* [1902] CD 898.
2. *London Association for Protection of Trade and Anor v. Greenlands Ltd.* [1916] 2 AC 15.
3. *Walker v. Sur & Others* [1893] QBD 435.

From the affidavits before me it is obvious that none of the other beneficiaries consent to the representation order. This application is also dismissed with cost.

Enclosure 36

This was Annavi s/o Mokkan's application for the writ and statement of claim against him to be set aside and dismissed with costs.

I do not have the benefit of the SAR's grounds and must be guided by Counsel as to what was urged before her. This appeal is therefore in that sense, a full rehearing.

Looking at the big picture and the amended statement of claim, what was being alleged against Annavi? In paragraph 3 it was alleged that he was being sued in his personal capacity and as representative of 36 other beneficial owners. In paragraph 6 it was alleged that the first defendant represented all the beneficial owners. In the prayers for relief however there is no relief whatsoever sought against the first

defendant as such. The thrust of the action is for a conveyance of the said land and that claim is directed against Nesa alone. There is no claim for damages against Annavi or anybody else. The claim is one of specific performance of an alleged contract which I have already found had no existence in law or fact.

Going by the plaintiff's submission it seems that YTL persuaded the SAR to dismiss Annavi's application to strike out on the basis that it was *res judicata*. YTL's Counsel relied upon the decision of Y.A. Anuar J. dismissing Dekor's application to have the said caveat removed. But Annavi was not a party to that decision YTL also relied on Y.A. Wan Yahya extending the caveat. But Annavi was not a party to that decision either, YTL deliberately elected to drop him from those proceedings and substitute Nesa in his place. In any case a decision permitting a caveat to remain, is not a decision on the merits of the dispute. It is merely a stay order to preserve the subject matter of the action pending the adjudication on the merits.

What it comes back to, in all the circumstances of this case, is whether a concluded and enforceable contract had been reached. Plaintiff's Counsel put it this way:

> The fact that the contract between the plaintiff and the 1st defendant may have been subject to a formal contract being drawn up or other technical details is no bar to a finding that a concluded agreement was reached.

See:

(i) *Yeo Gek Lang v. Alice Wee* [1979] l MLJ 213
(ii) *Esso Standard Malaya Bhd. v. Southern Cross Airways* (Malaysia) Bhd. [1972] 1 MLJ 168
(iii) *Diamond Peak Sdn. Bhd. & Anor. v. D.R. Tweedie* [1982] 1 MLJ 97
(iv) *Perry v. Suffields, Limited* [1916] 2 Ch. 187

Annavi's application (Enc. 29) to strike out the claim against him in his personal or alleged representative capacity was made under O. 18 r. 19, on all the grounds thereunder i.e. no reasonable cause of action, frivolous, scandalous, and vexatious, and an abuse of the process of the Court. He was entitled to succeed on a mere technicality i.e. that he had been sued in a representative capacity which did not exist. But he was also entitled to succeed on the merits for reasons which I have already set out. Counsel for the first defendant has spelt his merits in paragraph 43 of his submission. With respect I agree with all he says. It is not necessary for me to repeat them here. In the result I now order that the SAR's decision dismissing Annavi's appeal be set aside. His appeal is allowed both here and in the Court below.

In conclusion I would reiterate that:

(1) Enc. 19 in this civil suit is dismissed with costs.
(2) Enc. 21 in this civil suit is dismissed with costs.
(3) Enc. 35 being YTL's appeal against the SAR's decision striking out the claim against Nesa is dismissed with costs here and in the Court below.
(4) Enc. 36 being Annavi a/l Mookan's appeal against the SAR's decision is allowed. The action against him is dismissed with costs both for this appeal and in the suit.
(5) There will be an order in terms of Enc. 1 in SP24-511-92.

If the said solicitors still hold the RM55,000 paid by the plaintiffs as deposit, I direct that it be retained on fixed deposit and be directed *pari passu* towards the claims of the defendants and Dekor for their costs.

Before I conclude there are some other observations I must make. In deciding that the plaintiff's claim was utterly devoid of merit I acted on the undisputed facts and on what I considered, with respect to all concerned, to be elementary principles of law. This caveat and this action in all the circumstances was in my view an abuse of process.

It seems however that a view is becoming prevalent that caveats can be lodged with impunity however fanciful the grounds in support of them may be. And that in order to sustain them till the end of a civil action thereafter, it is enough for the plaintiff to raise some serious question to be tried.

I would once again reiterate that the differences between caveats and injunctions must be emphasised rather than glossed over. It is a very serious matter to freeze a person's land for years and years. Consequently all concerned should direct their attention in appropriate cases to compelling persons who lodge caveats to be forced to consider whether they should be made to give an undertaking as to damages, fortified with collateral if need be, where the caveat is being extended till final disposal of a suit.

Secondly, it is not enough merely to rely upon a conflict of evidence in affidavits in order to sustain a caveat until final determination of the suit. As Lord Diplock said in *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212 at p.217:

> ... Although in the normal way it is not appropriate for a Judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he "may think just" the Judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigation as to their truth.

In the affidavits filed there is a preponderence of evidence that Annavi was not acting on behalf of all the beneficiaries, and had no authority from them to do so. He has denied he was acting. Mr. Nadarajah the solicitor said he was acting for the beneficiaries. He did not say he was acting for all the beneficiaries. He has denied he had any such authority. The letter he wrote clearly stated it was a conditional promise to sell. YTL's contention that they had an enforceable contract is not based on any hard evidence whatsoever.